Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ABELE ASSOCIATES,
a Pennsylvania Limited Partnership,

Petitioner,

vs.

BOARD OF PROPERTY ASSESSMENT,
APPEALS & REVIEW,

Respondent.

On Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Petitioner receive due process pursuant to the Fourteenth Amendment to the Constitution of the United States in connection with the hearing before the Special Masters in this real estate tax appeal?

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STATEMENT OF THE CASE

This Petition for a Writ of Certiorari is an attempt by Petitioner, Abele Associates, a Pennsylvania limited partnership ("Abele"), to overturn a real estate tax assessment on certain property located in South Fayette Township, Pennsylvania ("Property") rendered after a full hearing before a board of viewers, a body created by the County of Allegheny to rule on real estate tax assessment appeals. The local taxing bodies are the South Fayette Township School District and South Fayette Township. The Property is identified as a flex space office/warehouse park. Abele initially appealed a decision of the Board of Property Assessment, Appeals and Review of Allegheny County setting assessed values for the Property. This appeal resulted in a hearing, with testimony and evidence submitted to a Board of Viewers ("Masters"). Subsequent to the hearing before the Masters, a Masters Report ("Masters Report") was submitted to an Administrative Judge for the Court of Common Pleas of Allegheny County, Pennsylvania. The detailed Masters report summarizes the evidence and testimony presented over three days of hearings, and sets forth the Masters findings and opinions based upon said evidence and testimony.

After Objections were filed by Abele to the Report of the Masters and respective briefs were filed on behalf of Abele, the South Fayette Township School District ("Respondent"), and the Township of South Fayette which is the local municipality where the property is located, the Administrative Judge entered an Order adopting his prior Memorandum Opinion and Order of Court dated May 19, 1994. Abele's objections were overruled and the Masters' Report was adopted as the final

adjudication and Order of the Common Pleas Court of Allegheny County.

Thereafter, Abele appealed the Common Pleas Court Order to the Commonwealth Court of Pennsylvania and, after briefs and arguments, the Commonwealth Court affirmed the Order of the Court of Common Pleas by Opinion (unpublished) and Order dated April 21, 1995. Abele thereafter applied to the Commonwealth Court for reargument and Respondent filed an Answer thereto. By Order dated May 31, 1995, Abele's Application for Reargument was denied by the Commonwealth Court.

Subsequently, Abele filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. On or about March 12, 1996, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal.

During the parts of three days over which the hearing was held before the Masters, Abele and the taxing bodies were given ample opportunity to present evidence and cross-examine witnesses. Testifying for Abele were E. Louis Averbach ("Averbach"), an independent real estate appraiser, and William G. Corace ("Corace"), the principal partner of Abele. Testifying on behalf of Respondent was Mr. Robert B. Nell, Jr., MAI, SRA ("Nell"), a representative of an appraisal firm.

Evidence was presented by all witnesses regarding the valuation of the Property and opposing counsel was given the opportunity to cross-examine and otherwise challenge or rebut the testimony and evidence.

In making their findings, the Masters recognized the importance of the Property's location. The Masters noted,

however, that "neither of [Abele's] witnesses presented any testimony to describe the subject property's location and many factors which make it desirable for business investment." (Abele Appendix B, p. 25)

After thoroughly reviewing the testimony and evidence submitted by Abele's appraiser Averbach, the Masters concluded that he was not acting "as an independent expert witness" and the Masters assigned "little weight to his testimony" (Abele Appendix B, p. 25). The Masters also found that the testimony of Abele's principal partner, Corace, should be given little weight because he valued the land based upon unsupported cost estimates. (Abele Appendix B, p. 35). In regard to Respondent's expert, Nell, the Masters found that in his appraisal report, he "outlined its purpose, functions, scope, assumptions and limitations to provide an unbiased report", and that his "appraisal and testimony were more credible and superior by far than Averbach's." (Abele Appendix B, p. 44)

In conclusion, the Masters found that Abele's "case as presented by its witnesses was not persuasive, lacked cohesion and credibility in making a factual presentation which was deficient in many respects in complying with standards enunciated in statutory and case law and ethical appraisal principles to confer validity to their assumptions, conclusions, and market value opinions." (Abele's Appendix B, p. 44)

Upon the completion of the testimony and the submission of documentary evidence, the Masters made findings of facts and conclusions of law, and established

assessed values for the Property for the tax years 1990 through 1993.

ARGUMENT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING CERTIORARI IN THIS CASE.

As clearly delineated in Rule 10.1 of the U. S. Sup. Ct. Rules, 28 U.S.C.A., review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Rule 10.1 illustrates the character of reasons which may be deemed "special and important" and includes cases

> When a state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10.1(c) of the U.S. Sup. Ct. Rules, 28 U.S.C.A. Abele relies upon this consideration in seeking certiorari (Petition, p. 11).

Not all federal questions decided by state courts are reviewed by this Court, however. As this Court stated in considering the similar language of former Rule 19 of the U.S. Sup. Ct. Rules, 28 U.S.C.A,

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular

> litigants [citation omitted]. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 73-74 (1955).

Abele does not contend that the Commonwealth Court attempted to overrule or ignore legal precedent established by this Court. Rather, Abele contends that the appropriate legal principles were improperly applied to the specific facts of this case. The question posited by Abele is whether the Masters were biased or prejudiced so as to deny Abele due process (Petition, first unnumbered page). The resolution of this question involves only the peculiar facts relating to these particular litigants. As such, this case is of no significance to the general public.

As recognized in *Rice*, this Court does not sit for the benefit of particular litigants or to resolve purely episodic problems. There is nothing about this case which implies a reach to matters of general public importance. There are, therefore, no special or important reasons why this Court should issue a writ of certiorari, and Abele's petition should be denied.

II. THE MASTERS DO NOT HOLD A DIRECT, PERSONAL, SUBSTANTIAL, PECUNIARY INTEREST IN THE SUBJECT PROPERTY SO AS TO VIOLATE THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In addition, this Court need not grant certiorari because the Commonwealth Court correctly applied the

law. Abele claims that the evidence shows bias and prejudice by the Masters. This contention is without merit.

It has been recognized that only in the "most extreme cases" will bias or prejudice be found to a degree necessary to find a violation of the due process clause. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986). This court has held that before a charge of judicial bias and prejudice can be found to violate due process, it must be found that the judge has an interest which is "direct, personal, substantial [and] pecuniary". *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). Although the degree of interest has been found to be difficult to define, one formulation is whether the:

> situation is one "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clean and true".

Ward v. Village of Monroeville, supra, 409 U.S., at 60, citing *Tumey v. Ohio*, 273 U.S. 510 (1927).

Abele points to three statements in the Masters report which it claims demonstrates bias and prejudice, but absent from Abele's argument is any allegation that the Masters held a direct, personal, substantial and pecuniary interest in the tax appeal in question or the real estate involved therein. Even if the three quotes cited by Abele from the Masters Report do, in fact, demonstrate prejudice or bias (which Respondent vehemently denies), Abele's argument fails as a matter of law because there is no allegation or indication that the prejudice and bias rise to the level required by the *Ward* and *Tumey* decisions.

Indeed, the cases cited by Abele involve facts substantially distinguishable from the tax appeal in question. Furthermore, the cases cited by Abele demonstrate the extreme extent of bias and prejudice necessary in order to sustain a finding of a denial of due process under the Fourteenth Amendment.

In Re Murchison, 349 U.S. 133 (1955) involved a Michigan criminal procedure which permitted the same judge to conduct a secret grand jury investigation and thereafter conduct a public trial on the contempt charges brought by him for conduct occurring during the grand jury investigation. This Court decided that the dual role of the judge in the secret investigation stage and the public trial stage brought about a deprivation of due process. Additionally, this Court found that the judge brought personal knowledge and information from the grand jury investigation that could not be tested by adequate cross-examination. No such dual role is present in this case, and the Masters are not alleged to have brought personal knowledge from a secret investigation not subject to common knowledge. In fact, they merely acknowledged that they were aware of the location of the property since it is located alongside a major interstate highway.

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), involved a provision of the Fair Labor Standards Act providing that fines collected for violation of the act be paid to the Department of Labor. This Court found that the due process clause of the Fifth Amendment was not violated by the dual role of the Department of Labor in assessing and collecting civil penalties because the "forbidden possible temptation . . . is too remote and insubstantial to

violate the constitutional constraints applicable". *Id.* at 243.

Abele cites *Johnson v. Mississippi*, 403 U.S. 212 (1971) for the proposition that a "trial before an unbiased judge is essential to due process." However, no bias has been demonstrated by Abele and the facts in that case are substantially different from the tax appeal in question. The *Johnson* case involved contempt proceedings against a civil rights activist conducted two years after the alleged misbehavior, wherein the judge himself had been a losing party in civil rights suits commenced by the same defendant.

Not only has Abele failed to allege any direct, personal, substantial and pecuniary interest on the part of the Masters as required by the *Lavoie, Ward* and *Tumey* decisions, any interest that can be inferred by the circumstances would certainly be "too remote and insubstantial to violate constitutional constraints." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 825; *Marshall v. Jerrico, Inc.*, 446 U.S. at 243.

III. ABELE RECEIVED ALL REQUISITE DUE PROCESS PURSUANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IN THIS TAX APPEAL.

An examination of the record herein also clearly reveals that Abele received all due process to which it was entitled in connection with this tax appeal. Due process is a flexible concept and the nature of the process that is mandated by that concept will vary depending upon the particular circumstances of the case. *Mathews v.*

Eldridge, 424 U.S. 319 (1976). The elements of due process include adequate notice, an opportunity to be heard, and a chance to defend oneself before a fair and impartial tribunal having jurisdiction over the matter. *Id.* at 333.

A review of the Master's Report leads to the clear conclusion that Abele's rights to due process were never jeopardized or infringed upon. Abele was given the full opportunity to litigate its tax assessment appeal before the Masters and the court. At all stages of this process, Abele has been provided with the requisite elements of due process, including the right to confront and cross-examine witnesses. Abele has been given every opportunity to satisfactorily present credible evidence in support of its valuations, and Abele was unable to do so.

It is noteworthy that the statements referenced by Abele are *de minimus* when compared with the voluminous detail which the Masters digested in making their findings. Furthermore, the comments referred to by Abele must be read in the context of the whole Masters Report and not as separate items. Abele confuses "biased opinion" with findings and opinions based upon the entire record before the Masters. The Masters properly developed opinions as to the Property based upon the evidence presented and these opinions are fully supported by the evidence. This point was reiterated in the Commonwealth Court's decision.

The fact that the Masters found Abele's evidence insufficient and unpersuasive does not mean that the Masters were predisposed or biased. As the Commonwealth Court noted, and as referenced above, the Masters found that "Averbach was impeached on six specific

instances, exposing oversights and exclusions concerning the property in question." (Abele Appendix B, p. 34) The Masters Report also details several other instances which support the Masters' findings of the lack of credibility on the part of Abele's experts.

In regard to Averbach's description of the Property, the Masters note that "Averbach repeatedly vacillated his description of the buildings and use without providing details for any of them." (Abele Appendix B, p. 13). The Masters had difficulty understanding and interpreting Abele's experts' conclusion that the cost approach is only relevant in cases of special purpose properties. In conclusion, the Masters found:

> Averbach and Corace were so enamored with their theory that the pre-engineered modular buildings with flex space were so unique and unusual that they ignored basic, elementary appraisal principals.

(Abele Appendix B, p. 32)

The Masters also discounted much of Averbach's and Corace's testimony regarding the impact upon market value of sales contracts requiring the seller to make site improvements. The Masters stated that "the purpose of the hearing viz. to receive testimony fixing market values for the subject property in a tax assessment setting, was obfuscated in a potpourri of unintelligible, irrelevant, repetitive, rhetoric." (Abele Appendix B, p. 28)

In addition, the Masters received evidence from Abele which they viewed as impermissible cost allocation among different projects, lack of explanation for unofficial subdivisions, unexplained charges in total acreage

and impermissible exclusion of "unusable acreage" with no value attributed thereto. (Abele Appendix B, p. 28). As to all of this information, the Masters found that "it was all irrelevant to the ultimate issue: market value of the property as a whole – land and buildings as of January 1 for the subject years." (Abele Appendix B, p. 29)

Respondent submits that what Abele describes as "bias" by the Masters is merely the result of Abele's inability to meet its burden of persuasion in this tax appeal. It is clear that the Masters went to great length and detail to justify and support their credibility findings. The credibility findings are clearly within the discretion of the Masters. The Masters Report and Record also demonstrate that the Masters made no error of law in examining the evidence presented and determining the weight to be given contradictory expert witnesses. In short, the Masters' credibility findings are fully supported by the record and the record clearly demonstrates that Abele received all the due process to which it was entitled pursuant to the Fourteenth Amendment.

Even if the three statements referred to by Abele are based entirely on the Masters' knowledge, outside of the record, such "judicial notice" of common knowledge such as a property's location is permissible. Courts may take judicial notice of facts of universal notoriety, which need not be proved, and of whatever is generally known within their jurisdiction. *Brown v. Piper*, 91 U.S. (1 Otto) 37 (1875).

In summary, Abele's argument is flawed because it fails to acknowledge that the Masters formed opinions based upon the totality of the evidence presented. For

this reason, the Commonwealth Court correctly concluded:

> all such reports contain "opinions" based on the evidence presented. The Masters discussed the basis for their opinion and the taxpayer did have the opportunity to cross-examine all testimony and evidence introduced. Therefore, taxpayer was not denied its due process rights.

(Abele Appendix A, p. 6)

CONCLUSION

Abele has not alleged a special or important reason for granting certiorari as required by Supreme Court Rule 10.1. In addition, Abele has made no showing that the Masters held a direct, personal, substantial, pecuniary interest in this tax appeal. As a result, the standards enunciated by this Court for finding a due process violation based upon judicial bias or prejudice have not been met. Furthermore, even if bias or prejudice can be attributed to the Masters, it would certainly be too remote and insubstantial to support a finding of a denial of due process rights.

The record before this Court demonstrates that Abele was in no way deprived of due process in connection with the tax appeal. At all stages of the tax appeal, Abele was provided with the requisite elements of due process: adequate notice, an opportunity to be heard and a chance to defend itself before an impartial tribunal. Furthermore, Abele had the full opportunity to submit evidence, cross-

examine witnesses and rebut evidence. In short, Abele received all process which the law says is due.

The Masters properly relied upon the evidence which they found to be most credible and discounted evidence they deemed to be incredible. The Masters went into detail to explain the reasons behind their credibility findings. It was prudent for the Masters to discount the credibility of Abele's experts in light of the numerous inconsistent, irrelevant, confusing and unsupported testimony presented by Abele and its expert. The Commonwealth Court correctly found that the Masters' credibility findings are supported by the record, and were within the Masters' discretion.

For the foregoing reasons, it is clear that Abele has failed to demonstrate a special or important reason, as required by Supreme Court Rule 10.1, for granting a Writ of Certiorari in this matter.

Respectfully submitted,

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